

October 26, 2005

John R. Harper
City Attorney
Harper & Burns LLP
[Address Redacted]
Orange, California 92866

**Re: Your Request for Advice
Our File No. A-05-199**

Dear Mr. Harper:

This letter is in response to your request for advice on behalf of councilmembers Warnie Enochs and Richard Ostling regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

QUESTION

May councilmembers Enochs and Ostling take part in city council decisions regarding two building projects, when they have been named in their individual capacities as defendants in a lawsuit by the developer, who seeks damages for alleged improprieties in a prior city council decision on the same projects?

CONCLUSION

No, under the circumstances you describe, councilmembers Enochs and Ostling are disqualified from taking any part in these decisions.

FACTS

Alexander Communities (“Developer”) processed two development projects through the City of Murrieta Planning Commission, both of which were denied. Developer appealed to the city council, and the decision of the planning commission was upheld by a vote of 3-2 and 2-2, with one member abstaining on the latter vote.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

Developer then filed suit against the City seeking a reversal of these denials, and sought damages against three councilmembers, Messrs. Enochs, Gibbs and Ostling, sued in their individual capacities.

Several months prior to the city council's consideration of the projects, there was a recall directed at three councilmembers (not including Messrs. Enochs and Ostling), resulting in the recall of one councilmember. Mr. Gibbs took that councilmember's seat. Developer was a contributor to the anti-recall campaign. The allegations of the lawsuit contend that councilmembers Enochs and Ostling were supporters of the recall effort and, together with Mr. Gibbs, retaliated against Developer for its anti-recall position by denying its projects. The damages are claimed in connection with this alleged retaliation.

Developer subsequently offered to dismiss the lawsuit without prejudice against the City, and with prejudice as to the three individuals, in exchange for a rehearing of the projects by the planning commission (as a result of modifications to the projects since the original denial) and a tolling of the statute of limitations as to the City. The City accepted the settlement proposal, as did councilmember Gibbs. Councilmembers Enochs and Ostling, who are represented by outside counsel, chose not to accept the offer, but opted instead to proceed with an anti-SLAPP motion and, if unsuccessful, to defend the lawsuit.² You inform us that Developer has indicated that it would dismiss all litigation if its projects are approved. In the meantime, pursuant to the settlement agreement, the planning commission has reconsidered and approved the two projects. Developer appealed the decision to the city council, which will decide the matter on November 2, 2005. On October 18, the court issued a tentative ruling denying the anti-SLAPP motion by defendants Enochs and Ostling, and at a hearing on the following day indicated that the final decision would probably not be available until after the city council decides the appeal from the planning commission, the decisions on which you now seek advice.

ANALYSIS

Your question concerns the obligations of councilmembers Enochs and Ostling under the Act's conflict of interest rules, which provide that a public official may not make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which the official knows, or has reason to know, that he has a financial interest. (Section 87100.)

The Commission has developed an eight-step analytical process for deciding whether an official has a disqualifying conflict of interest in a given governmental decision. You understand that the subjects of your inquiry are "public officials" who would be "making" or "participating in making" governmental decisions regarding appeals on Developer's projects at the upcoming city council meeting. You further understand that decisions regarding these appeals are likely to affect the personal finances

² So long as they were sued in their individual capacities and the city had not assumed their defense or agreed to indemnify them for any damages award, decisions on their conduct of the lawsuit were personal, not governmental, decisions.

of councilmembers Enochs and Ostling (see section 87103, regulation 18703.5) by affecting litigation in which they are named as defendants in their individual capacities, since they are exposed to the costs and risks of litigation.³ You have not suggested that these officials have any economic interest in the decisions at issue apart from the possible impact of the litigation on their personal finances; we therefore do not consider whether these officials may have other economic interests in the upcoming decisions. Under regulation 18704.5, a public official is deemed to be directly involved in any governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family. We begin the analysis, then, at steps five and six of the eight-step process.

Steps 5 and 6. Will There be a Reasonably Foreseeable Material Financial Effect on the Officials' Economic Interests?

Effects on an official's personal finances are "material" as stated in regulation 18705.5(a), which provides in pertinent part that: "A reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$250 in any 12-month period."

Once a public official has determined the materiality standard applicable to his or her economic interest in a decision, the next step is determining whether it is "reasonably foreseeable" that the effect of the decision will reach a level in any 12-month period where the effect is "material" – in this case, where the personal expenses, income, assets, or liabilities of the official increases or decreases in an amount of is \$250 or more. (Regulations 18703.5, 18705.5)

A material financial effect on an economic interest is "reasonably foreseeable" if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered "reasonably foreseeable," but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

³ A public agency's commitment to defend and indemnify officials sued in their individual capacities can permit them to take part in decisions from which they would otherwise be disqualified. (See, e.g. *Steele* Advice Letter, No. A-05-071.) Here, however, you have not told us that these defendants have tendered their defense to the City, or that they are insulated in any way from the costs and risks of this litigation. We therefore must assume that they bear all the costs and risks of this litigation themselves.

As we understand your account of the facts, the decisions in question will determine whether Developer's projects are approved or not approved by the City. We also understand that there is a direct correlation between the outcome of these decisions and the continuance or discontinuance of the litigation. Thus if the projects are approved, the lawsuit against councilmembers Enochs and Ostling will be dismissed. If the projects are not approved, the lawsuit will proceed.⁴

Because of the high cost of litigation, it is "reasonably foreseeable" that if the lawsuit continues, the impact on the personal finances of both officials will soon exceed the materiality threshold of regulation 18705.5 – and if the lawsuit is dismissed after the decisions in question, the officials will be relieved of those costs. Thus it is reasonably foreseeable that the decisions in question will have a material financial effect on the officials' personal finances, and councilmembers Enochs and Ostling are therefore disqualified from making or participating in these decisions.⁵

Steps 7 and 8: Exceptions.

An official who otherwise would have a conflict of interest in a decision may still participate in that decision if the circumstances are such that the "public generally" rule might be invoked. This rule applies when the reasonably foreseeable financial effect of a decision upon a public official's economic interests is "material," but not distinguishable from foreseeable effects on a significant segment of the public generally. (Section 87103; regulation 18707(a).) It does not appear that the reasonably foreseeable financial effects on the officials' personal finances will be shared by the public generally.

Finally, an official with a conflict of interest in a decision may still participate in that decision if the "legally required participation" rule is applicable. (Section 87101; regulation 18708.) This is an exception that typically applies when a public agency is unable to assemble a quorum of its members without the participation of an official who has a conflict of interest. You have not suggested that a quorum of the city council will be unavailable to make the decisions in question, but if this should turn out to be a problem, the provisions governing "legally required participation" could be invoked to enable the City to decide the appeal. The process is explained in some detail in the *Steele* Advice Letter, No. A-05-071, which we enclose for your convenience.

⁴ We are less certain of the effect of a mixed result on the two projects – if one project is approved and the second project is not, because we have no information on Developer's likely reaction to such an outcome. However, this contingency does not affect our conclusion that it is "reasonably foreseeable" that the decisions will have a material financial effect on the officials' personal finances.

⁵ Of course, if the officials were financing their defense of this lawsuit from campaign funds, and expected to pay any resulting judgment from the same source, the lawsuit might *not* have a foreseeable personal financial effect on them. But you have not indicated that councilmembers Enochs and Ostling are using or intend to use campaign funds to insulate their personal finances in this manner.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Lawrence T. Woodlock
Senior Counsel, Legal Division

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Enclosure